

**Washington State Department of Transportation's
Federal Aviation Administration
Overall Annual Disadvantaged Business Enterprise Goal
for Federal Fiscal Year 2010**

The Washington State Department of Transportation submits this Federal Fiscal Year (FFY) 2010 Disadvantaged Business Enterprise (DBE) goal and methodology to the U.S. Department of Transportation's Federal Aviation Administration (FAA) for review and approval pursuant to 49 CFR § 26.45 to establish the overall DBE goal for its federally-assisted airport contracts. For FFY 2010, WSDOT has established a proposed split overall DBE goal for the two projects with FAA financial assistance. Pursuant to 49 CFR § 26.45, a step-two adjustment was utilized to determine a split goal was necessary. The goal was based upon two projects: one, a Pavement Management Program Update, with a goal of 0% and the second, an Airport Improvement Project, with a proposed 8.8% race-neutral DBE goal.

WSDOT determined its FFY 2010 overall goal by calculating the relative availability of DBEs statewide. Based upon the availability of DBEs for our two federally funded projects, WSDOT is proposing an overall annual DBE goal of 8.8% applicable only to the Airport Improvement Project. WSDOT projects that we will meet this goal through entirely race neutral means, principally on the Airport Improvement Project.

This methodology and the supporting evidence complies with the requirements of the federal regulations, as well as the decisions in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004); *Western States Paving Co. v. Washington State Department of Transportation*, 907 F.3d 963 (9th Cir. 2005); and *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).¹

1. Step One

a. Availability Study

To meet the requirements of 49 CFR §26.45, WSDOT commissioned an Availability Study, entitled "Race, Sex, and Business Enterprise: Evidence from the State of Washington" ("Study"), from NERA Economic Consulting (NERA), a

¹ See also *Concrete Works of Colorado Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (Denver's program was constitutional based upon a similar methodology by the same consultant); *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N. D. Ill. 2003) (Chicago's Minority and Women Business Program was based upon similar "strong evidence").

nationally recognized economics consulting firm. WSDOT relied upon this Study, together with WSDOT's upcoming projects and available DBE firms in determining its FFY 2010 overall annual DBE goal.

The Study provides a statistical analysis of baseline DBE availability and factors impacting entrepreneurial success on WSDOT contracts and subcontracts. The Study estimated statewide DBE availability using data on WSDOT's expenditures for highway construction and engineering consulting contracts and subcontracts, many of whom would also work on airport projects, and databases of firms in those industries. The Study reviewed existing quantitative evidence of discrimination and assessed the likelihood that statewide DBE availability would be different if the relevant markets in which WSDOT operates were race-neutral; it then estimates the magnitude of this difference. The Study's results are summarized below.

The Study provides a narrowly tailored, statistically sound and detailed basis to meet the requirements of 49 CFR, Part 26 and fully addresses the remedial purpose of the DBE Program and Congressional intent. The Study examines disparities between the rates of business formation and earnings between DBEs and similarly situated businesses owned by white males. The Study analysis supports the inference that discrimination continues to impede the ability of disadvantaged minority- and women-owned firms to compete fully and fairly for WSDOT prime contracts and subcontracts.

Having established the existence of such discrimination, a governmental entity "...has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." Croson, 488 U.S. 492.

Using empirical market definitions, business establishment data and statistical verification surveys, the Study estimated 18.77% as the base availability figure for DBE availability in the transportation construction industry in Washington State.

b. Definition of WSDOT's Contracting Market Area

Based upon four years of WSDOT's contract and subcontract expenditure data, a total of 32 four-digit Standard Industrial Classification (SIC) codes² were identified as WSDOT's product market, and the State of Washington was identified as the geographic market. This approach incorporates the guidance of USDOT to use 4-digit SIC codes and to weigh that data by WSDOT's expenditures.³

² SIC codes can be converted into the North American Industry Classification System (NAICS) codes now adopted for some purposes by the U.S. Census Bureau.

³ <http://osdbuweb.dot.gov>.

2. Step Two Adjustment

WSDOT adjusted its baseline availability pursuant to USDOT's Office of Small and Disadvantaged Business Utilization's (OSDBU) *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*:

Step Two of the Goal setting process is intended to adjust your Step One Base Figure to make it as precise as possible. Under the rule, you must consider all evidence available in your jurisdiction to determine whether an adjustment is necessary.

WSDOT evaluated the two upcoming projects scheduled for award in FFY 2010 and determined only one of those projects, the Airport Improvement Project, contained DBE contracting opportunities. The other project, a Pavement Management Program Update, was evaluated and it was determined the project contained no DBE contracting opportunities.

Therefore, it was necessary to evaluate the DBE goal for a Step Two adjustment to the baseline figure. Utilizing data representing the current capacity of DBEs to perform FAA work; WSDOT adjusted the base figure to 8.8%. Therefore, the FFY 2010 overall annual DBE goal for FAA is 8.8%.

a. First Project

The first project, a **Pavement Management Program Update**, has an estimated cost of \$900,000 which is partially (\$855,000) funded by the FAA. This project consists of assessing relative conditions of pavement for selected Washington State Airports. WSDOT evaluated the certified firms available within the Directory of Certified Firms maintained by the Office of Minority and Women's Business Enterprises, the Unified Certification Program (49 CFR § 26.81), and determined there were no certified DBE firms available to perform this work. Therefore, WSDOT has determined the goal for the Pavement Management Program Update is 0%.

b. Second Project

The second project with FAA funding, anticipated to be awarded in FFY 2010, is the **Methow Valley State Airport, 2010 Airport Improvement Project**. This project consists of improvements at the airport in Methow to construct updated electrical items to replace the outdated systems. To determine the overall annual goal for this project, WSDOT analyzed the project and determined applicable SIC codes utilizing the information available within the NERA Study. The NERA Study identified the SIC codes with corresponding DBE availability (Tables 13 and 14). Out of the 32 SIC codes, it was determined five were applicable to the project. The average of the five relevant SIC codes are 8.802% (see below calculations).

SIC Code	Description	DBE Availability
1611	Highway and Street Construction, Except Elevated Highways	8.95%
1731	Electrical Work (electrical work except burglar and fire alarm installation)	8.29%
1795	Wrecking and Demolition Work	10.29%
4212	Local Trucking Without Storage (specialized freight)	9.72%
8713	Surveying Services (except geophysical surveying)	6.76%
	Average DBE Availability	8.8%

c. Step Two Adjustment Conclusion

Pursuant to 49 CFR 26.45(b) “Your overall goal must be based on demonstrable evidence of availability of ready, willing and able DBEs...” To satisfy this requirement WSDOT evaluated the upcoming projects to be let in FFY 2010 and determined opportunities and availability existed for only the Methow Valley State Airport, 2010 Airport Improvement Project. Therefore, the overall annual goal applies only to this project, with an 8.8% goal.

3. Anecdotal Evidence

In addition to the statistical evidence of discrimination provided in the Study, WSDOT gathered anecdotal evidence of discrimination. WSDOT conducted focus groups of DBEs and non-DBEs, exploring the participants’ experiences with discrimination, bidding and performing WSDOT contracts and in accessing the financing, bonding, networks, etc., necessary for business success. WSDOT also held public meetings to elicit comments on DBEs’ experiences during the time when goals were suspended.

The Focus Group Report contents are summarized below. Most DBEs reported experiencing significant racial, ethnic and gender barriers to their full and fair participation in WSDOT’s market place. These included:

- The perception that they are inherently less competent and professional than their White male counterparts.
- The imposition of higher performance standards.
- Harassment and disparate treatment at worksites.
- Exclusion from industry and professional networks.
- Discrimination by lenders and sureties.
- Discrimination by trade unions.
- Very limited non-goals opportunities, including for public sector prime contract opportunities.

- Limitations on subcontracting scopes of work to no more than affirmative action goals.
- Substitution by prime contractors after contract award.
- Retaliation for complaining about poor treatment.
- Immediate and drastic reduction in solicitations and subcontract awards after WSDOT's suspension of contract goals.

Many non-DBE general contractors found the DBE Program requirements difficult and burdensome because:

- Goals were unrealistic.
- There is insufficient availability of qualified DBEs.
- Work that they preferred to self-perform was subcontracted to DBEs.
- Waivers were believed to be unavailable.

Non-DBE prime design consultants' experience of the Program was less burdensome, although they too experienced:

- Limited availability of qualified DBEs.
- Increased project management responsibilities and attendant costs from using DBEs.

Some non-DBE subcontractors that compete against DBEs felt that they suffered race and gender discrimination as a result of the DBE goals.

- DBEs were used to meet goals even when they provided higher quotes than non-DBEs.
- Small design firms had few opportunities because large firms prefer not to team unless it is to meet DBE goals.

In addition to the information provided in the Focus Group Report, WSDOT held a series of public meetings to solicit information from contractors and consultants regarding the barriers and experiences they faced, including whether minorities and women continue to suffer from discrimination in WSDOT's marketplace. This year WSDOT accepted only written comments that would be considered in evaluating the overall DBE goal.

DBE commentators supported continued application of race-conscious goals on WSDOT projects. DBEs agree that without the use of contract goals, prime contractors will rarely use or even solicit DBEs.

One DBE that attended a WSDOT public meeting relayed they had approached two prime contractors that had complained they had difficulty meeting the DBE project goals. The DBE firm presented information about their firm and provided the prime contractors with information as to how they might assist them to

achieve their DBE project goals. “They were not interested. Their attitude was typical of the industry as a whole. The majority of the firms resent DBE firms as much as they resent the DBE goals on construction projects....” The result of that mindset is similar to that after the passage of I-200, which resulted in a number of construction and consultant firms going out of business. For example, a DBE firm’s success began as a direct result of state goals on state funded projects. After passage of I-200 the firm lost contracting opportunities since prime consultants would not use the firm to meet project goals. The firm feels the continuation of DBE goals on *federally* funded projects is even more crucial to the success of small and minority owned businesses.

Based upon this information, together with the results of the Study, WSDOT concludes that discrimination still limits the opportunities for DBEs of all racial and ethnic groups and white women to perform on its prime contracts and subcontracts. Therefore, to narrowly tailor its Program to achieve the Program’s objective of creating a level playing field for all firms, WSDOT must judiciously apply contract goals to achieve its overall annual goal.

4. Projection of Race-Neutral versus Race-Conscious Attainment

Pursuant to OSDBU’s *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program* and 49 CFR § 26.51(a), “You must meet the maximum portion of your overall goal by using race-neutral means of facilitating DBE participation.”

This is the first year WSDOT has reinstituted DBE goals, therefore the overall annual DBE goal shall be achieved through all race-neutral means to establish a baseline of DBE race-neutral participation for the coming years.

5. Race-Neutral Attainment

WSDOT will meet the maximum feasible portion of its overall goal through the race-neutral measures listed below.

WSDOT will maximize outreach efforts to the DBE contracting community and the use of DBE Support Services to increase the utilization and support of DBEs that participate on upcoming WSDOT projects.

a. Supportive Services

WSDOT provides the following supportive services to DBEs through the DBE Supportive Services program administered by the Office of Equal Opportunity:

- Assistance in the development of immediate and long-term business management, record keeping, financial and accounting capabilities

- Long-term business development assistance to increase opportunities to participate in more varied and “in demand” types of work in an effort to grow their businesses and to achieve eventual self-sufficiency
- Programs on contracting procedures and specific contract opportunities
- Assistance in obtaining bonding or financing
- Assistance to start-up firms, particularly in fields with historically low DBE participation
- Identification of potential highway-related DBEs and prequalification assistance
- In an effort to increase awareness of the DBE Supportive Services program, WSDOT has developed a DBE Supportive Services hotline (888) 259-9143, email address dbess@wsdot.wa.gov, and website: www.wsdot.wa.gov/EqualOpportunity/DBE.htm.

b. Outreach and Networking

WSDOT engages in a number of outreach efforts to minority and women's organizations to enhance DBE opportunities in Department projects. These efforts include but are not limited to:

- Sponsorship of the annual Regional Contracting Forum held in Seattle, Washington, in partnership with state, local and federal agencies. This year's event attracted over 800 firms interested in doing business with WSDOT and other agencies and provided direct one-on-one outreach to firms.
- WSDOT works with organizations such as the Northwest Minority Supplier Diversity Council, Women in Construction, USDOT's Small Business Transportation Resource Center, the Women's Transportation Seminar, Urban League of Metropolitan Seattle Contractor Development and Competitiveness Center, African American Partners for Prosperity, the Office of Minority and Women's Business Enterprises and other groups to promote the DBE Program.
- WSDOT has established a Washington State DBE Work Group comprised of WSDOT divisions and local agencies, among others, that advises WSDOT on DBE issues, including but not limited to, goal setting, outreach, training, etc.
- In 2006, WSDOT established a Goal Monitoring Committee Meeting which is comprised on staff from Headquarters Construction, Highways and Local Programs, Consulting Services and Washington State Ferries that meet on a monthly basis to address the DBE program and goal setting.

c. Complaint Procedure

WSDOT has implemented the DBE Fraud and Abuse Hotline for reporting suspected fraud in the DBE program. This hotline contains a 1-800 number, email address and handouts, including business cards and other flyers. The handouts prompt individuals to contact the hotline if they notice contract fraud, kickbacks, wrongful claims, unapproved substitutions of DBEs or failure to follow contract procedures including sharing of equipment or employees.

d. Prompt Payment

WSDOT continues to enforce its prompt payment provisions and processes through its various offices, contractors and contract provisions. It impresses upon its personnel and prime contractors the necessity and importance of meeting these requirements.

5. Public Participation

To satisfy the public consultation requirements of the regulations, WSDOT will provide a press release to all media outlets in Washington State and publish the proposed FFY 2010 FAA annual DBE goal in the Seattle Daily Journal of Commerce. Included in its press release and publication is WSDOT's request for public comment and inspection of the goal methodology for 45-days from date of publication. WSDOT will be working in conjunction with Sound Transit to host an outreach event and publicize the overall annual goals.